Taylor Cadillac, Inc./Uptown Auto Prep, a Joint Employer *and* Teamsters, Chauffeurs, Warehousemen and Helpers Union Local 20, IBT, Petitioner. Case 8–RC–14686

March 11, 1993

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

The issues in this case include: (1) whether a defaced notice of election constitutes grounds for setting aside an election; and (2) whether an eligible employee was properly prevented from voting because he allegedly arrived after the polls had closed.

The National Labor Relations Board, by a three-member panel, has considered objections to an election held April 1, 1992, and the Regional Director's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 12 for and 10 against the Petitioner, with no challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the Regional Director's findings and recommendations,[1] and finds that a certification of representative should be issued.

We agree, for the following reasons, with the Regional Director's recommendation to overrule the Employer's Objection 1, which alleged that the election should be set aside because the Board's notices of election had been repeatedly altered by a bold marking in the ''yes'' box on the sample ballot. The appropriate standard for evaluating altered Board documents was announced in *SDC Investments*,[2] where the Board held that the central issue is whether the altered document is likely to have given voters the misleading impression that the Board favored one of the parties to the election. To resolve this issue, the Board held that the initial inquiry is whether the source of the defacement is clearly identified on the face of the material. If so, then the Board will find that the document is not misleading, because employees would know it emanated from a party and would not be led to view it as a Board endorsement of that party. If the identity is not evident, then the Board will examine the nature and contents of the material to determine whether the document has a tendency to mislead employees into believing that the Board favors a particular party.[3]

Here, the party responsible for defacing the sample ballots was not identified on the face of the notices of election. Accordingly, the inquiry is whether the particular defacements could have tended to mislead employees into believing that the Board favored a party to the election. The Employer presented testimony that the defaced sample ballots had ''large, bold'' markings in the ''yes'' box. The defaced sample ballots are not, however, in the record, and the Employer does not contend that it provided them to the Regional Director. In the absence of the defaced sample ballots themselves, and relying therefore solely on the Employer's description of them, we find that any such ''large, bold'' markings would be sufficiently distinct from the Board's standard preprinted sample ballots so as to preclude a reasonable impression that the markings emanated from the Board.[4] We, therefore, agree with the Regional Director that the defacements on the notices of election did not create the impression that the Board favored the Petitioner in the election.

In Objection 5, the Employer argued that an eligible voter, Mahoney, was improperly denied the opportunity to vote when he arrived at or prior to the close of the election. It is undisputed that the Petitioner's agents told Mahoney that he was too late and turned him away. In a recent decision, *Monte Vista Disposal Co.*,[5] the Board held that a bright-line test was appropriate in ''late voter'' cases. In *Monte Vista*, the Board decided that ''an employee who arrives at the polling place after the designated polling period ends shall not be entitled to have his or her vote counted [footnote omitted], in the absence of extraordinary circumstances.''[6] ''Extraordinary circumstances'' include tardiness caused by actions of one of the parties.[7]

In the instant case, it is undisputed that the Board agent designated his watch as the official timepiece for the election at the preelection conference. No party dissented from this designation. The polls were scheduled to close at 4 p.m. The Board agent testified, without contradiction, that he opened the ballot box when his watch showed 4 p.m. Further, even the evidence presented by the Employer indicates that the ballot box had been opened before Mahoney arrived at the polling place. Therefore, it must be concluded that Mahoney arrived after 4 p.m.[8] The rule of *Monte Vista* applies,

[1] In the absence of exceptions, we adopt, pro forma, the Regional Director's recommendation to overrule the Employer's Objection 3.

In adopting the Regional Director's recommendation to overrule Objection 2, we note that assuming arguendo that certain of the Employer's evidence supports a finding that the union representatives went upstairs towards the polling area prior to the 4 p.m. close of polls, there is no evidence showing that they entered into the polling area (the upstairs lunchroom) when they arrived at the top of the stairs. In this regard, the evidence establishes that there was also a changing room and a hallway outside the voting room at the top of the stairs; and that arrival at the top of the stairs did not therefore constitute simultaneous entry into the polling area.

[2] 274 NLRB 556 (1985).

[3] See *Baptist Home for Senior Citizens*, 290 NLRB 1059 (1988).

[4] See *Rosewood Mfg. Co.*, 278 NLRB 722 (1986).

[5] 307 NLRB 531 (1992).

[6] Id. at 533.

[7] Id.

[8] The evidence presented by the Employer that Mahoney went to the polling place shortly before the 4 p.m. closing time does not af-

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and Mahoney was properly denied the right to vote unless extraordinary circumstances prevented him from arriving on time. Although the Employer presented testimony that the Petitioner's agents standing in the polling area turned Mahoney away, stating that the polls had closed, such conduct occurred after Mahoney arrived late and, therefore, could not have prevented him from arriving on time. Accordingly, the Regional Director's recommendation that Objection 5 be overruled is affirmed.[9]

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Teamsters, Chauffeurs, Warehousemen and Helpers Union Local 20, IBT and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All regular full-time and part-time service department employees, body shop employees, parts department employees, service writers, dispatchers, warranty clerks, cashiers, payroll clerks and porters employed by Uptown Prep, a joint employer, who regularly work at the Taylor Cadillac facility, at 1415 Jefferson Ave., Toledo, OH, but excluding all office clerical employees, professional, guards, and supervisors as defined in the Act.

MEMBER DEVANEY, concurring.

I agree with my colleagues in all respects except their rationale for overruling Objection 5.

In regard to Objection 5, I agree with my colleagues that Terry Mahoney was not improperly denied an opportunity to vote, as asserted by the Employer. In doing so, however, I do not rely on *Monte Vista Disposal Co*., 307 NLRB 531 (1992), in which I dissented, but which, in any event, I find distinguishable here.

According to the evidence submitted by the Employer in support of this objection, and unlike the circumstances involving the late-arriving voters in *Monte Vista*, the Board agent here had already opened the ballot box when Mahoney arrived at the polling place. Also unlike the voters in *Monte Vista*, Mahoney merely ''appeared at the door'' of the voting room, and ''stuck his head inside,'' but made no attempt to make his presence known to the Board agent. The Board agent's back was turned, and his attention diverted from Mahoney throughout this brief sequence, and he was apparently unaware even of Mahoney's presence in the polling area. Finally, unlike the voters in *Monte Vista*, Mahoney made no attempt to vote, apparently said nothing at all, and instead left the polling area almost as soon as he got there, immediately after being told by a union official that he was ''too late to vote.'' Under these unusual circumstances, I find, in agreement with my colleagues, but without regard to *Monte Vista*, that Mahoney was not improperly denied an opportunity to vote.

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fect this result, inasmuch as there is no contention that the witnesses so testifying were observing the time according to the Board agent's watch, the official timepiece for the election.

[9] Our conclusion that Mahoney was not improperly denied the opportunity to vote coupled with our pro forma adoption of the Regional Director's determination concerning David Turner's eligibility in Objection 3 results in the finding that Ennio Braida's vote, which is at issue in Objection 4, is not determinative in the 12 to 10 election results for the Petitioner. Accordingly, we find it unnecessary to pass on the Regional Director's determination that the Employer improperly raised Braida's eligibility. Thus, assuming arguendo that the Board's policy of not considering postelection challenges in the form of objections could be overcome and that the Employer's inclusion of Braida on the *Norris Thermador* list was not controlling, the improper inclusion of Braida's vote could not have affected the results of the election.